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THE JUDICIAL ART OF WILEY B. RUTLEDGE

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I

Wiley Blount Rutledge brings an essentially new background to the Supreme Court of the United States. Not previously has there come to the high tribunal a jurist who combines a Western origin and career with legal training and participation as a teacher in the modern legal education of the West. The significance of his appointment extends beyond mere geography because it involves the emergence on the Court of new currents of thought and experience.

It was natural and on the whole salutary for the membership of the Court to swing so largely to the Northeast during the two decades following the First World War, for the legal profession reflected more fully in that section than in any other the advances in jurisprudential thought and in legal education which industrialism had produced. The spearhead of this movement was at the Harvard Law School. The philosophy and the historical methods of Holmes were united with sociological thought and the realism implicit in the case method of instruction in the program at Harvard and particularly in the work of Pound, Frankfurter and Chafee.

Because of its size, the productivity of its faculty, and the prestige attaching to its brilliant past, Harvard set the pace for legal thinking and writing throughout the nation and, indeed, to a large extent throughout the Anglo-American world during the period when the recently-dominant generation was coming to maturity. Nevertheless it is not apparent that the Harvard

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Law men who practice all over the country have maintained a challenging leadership of professional thought; for the same environmental factors which have influenced the bar as a whole toward conservatism have affected them in the same way as their fellows whose training took place at local schools. The distinctive Harvard influence has been exerted rather through the faculty itself, drawn from many quarters but necessarily rooted in Cambridge, and through certain graduates in the more sophisticated New York City circles and in Government service, who have been a potent force for change in professional attitudes and progress in legislation and administration.

The earliest of the other progressive influences in post World-War American jurisprudence have likewise emanated from Eastern law schools. Columbia, Yale, and the University of Pennsylvania have been centers for the work of brilliant teachers and jurists whose influence has permeated far by means of the spoken and the written word and is perhaps best reflected in the superlative quality of much of the student work in their law reviews. At Columbia and Yale new departures in legal education, produced by conscious faculty collaboration, have given rise to many new volumes of law teaching materials, widely used all over the country. These have to a large extent superseded the Harvard casebooks of an earlier period. Most of the outstandingly influential of the graduates of these schools also have worked on their faculties, in New York City, and in the Government service, centering in the East.

Only recently have Western and Southern law schools displayed signs of fostering similarly fruitful developments in legal education and thought. Except in a few instances, their resources have been smaller and their traditions of scholarship less thoroughly established than in the leading institutions of the East, whatever may be said of the adequacy with which they have prepared lawyers to meet the needs of their communities. Of late, however, the inauguration of four-year curricula in a few schools and related curricular experimentation in others, regardless of the ultimate validity of these developments, give evidence of national leadership west of the Alleganies which goes beyond such individual phenomena as the scholarship of Cooley, Hammond, and Wigmore.

In the meantime Western legal education has patterned itself

largely after that which developed in the principal schools of the East, using their teaching materials and producing law reviews of the same type as those published along the Atlantic seaboard. But this development too extends back in most schools little beyond the First World War. Only during the subsequent period have graduates been emerging who could be said to reflect the Western legal education of today, containing the same elements as its Eastern prototype with whatever modifications have resulted from a partially different environment.

For these reasons the justices who have established the now-dominant thought upon the Supreme Court, with the exception of three recent appointees to the present Court, Justices Black, Murphy, and Jackson, have gone to Eastern university law schools. Mr. Justice Rutledge is the first appointee who has spent his life as a lawyer in the West after a legal education obtained there since the First World War.[1] He has, moreover, participated to a large extent in the developments in Western legal education which have brought it to its present state.[2] If such a background has a unique contribution to make to the Court's jurisprudence, it will be offered through him—with the individual quality, it goes without saying, that the infusion of a strong personality is certain to produce.

Perhaps the difference between the approach of a Rutledge and that of the judges with an essentially similar scheme of ideas who have preceded him on to the Court will lie largely in a certain mellowness which has been acquired through years of rubbing elbows with plain people in rural communities, small towns, cities, and colleges of the West, where world-shaking controversies burn a little less fiercely and viewpoints are urged a little less stridently than in the universities and urban centers of the East, and where the pace of living is slightly less accelerated. People, in short, use their time to a somewhat greater extent to be neighbors and are somewhat less intense about their differences in the areas where Mr. Justice Rutledge has spent his life than in the regions where there is greater consciousness of cleavages.

1. Mr. Justice Rutledge obtained his LL.B. in 1922 at the University of Colorado.

2. Mr. Justice Rutledge was Associate Professor of Law at the University of Colorado from 1924 to 1926, successively Professor of Law and Dean at Washington University from 1926 to 1935, and Dean at the State University of Iowa from 1935 to 1939.

This Western quality is often regarded in the East as the product of ignorance or of indifference toward the great issues of the day. It is, rather, the result of a response to some of the values of individual living which seem of less importance in other environments; but, however that may be, it exists in Mr. Justice Rutledge alongside an intellectual and emotional concern with political and social issues that is evident in his opinions as it has been in his previous advocacy of educational progress, professional improvement, and political reform.

This combination of appreciation of the values which repose in individual living and of intense concern with great issues accounts for two of the most striking aspects of Mr. Justice Rutledge's opinions as a member of the United States Court of Appeals of the District of Columbia. These are meticulous, discerning exposition of the facts, issues, and relevant law in private-law appeals, and bold, striking blows for freedom in the constitutional cases that have come before the Court. One may not anticipate that the cases which arise in the Supreme Court will afford equal occasion for the display of the first of these qualities; for the Court of Appeals is an appellate court for run-of-the-mine litigation in the District of Columbia as well as a forum for public-law cases arising in the operations of the Government; while the Supreme Court, exercising a largely discretionary jurisdiction, holds itself in reserve for the decision of important or unresolved issues of Federal law, constitutional and other.[3] Despite this difference, one turns to Mr. Justice Rutledge's opinions on the Court of Appeals[4] for the best indication of his probable contribution to the jurisprudence of the

3. It is worthy of note, however, and not without significance, that Mr. Justice Rutledge's first opinion as a member of the Supreme Court in Aguilar v. Standard Oil Co. of New Jersey (1943) 87 L. Ed. (Adv.) 799, treats an issue of admiralty law in much the same manner as many of the opinions in which he has discussed questions of local law in the District of Columbia. The case and its companion, Waterman Steamship Corp. v. Jones, dealt with the liability of shipowners for the care and maintenance of seamen injured on shore while en route on personal business to and from the vessels upon which they were employed. Mr. Justice Rutledge, speaking for the Court, reviewed carefully the rationale and previously-recognized incidents of the shipowners' liability, drew upon a sympathetic understanding of the human realities upon which the liability bore, and set forth the conclusion that it should extend to situations such as these, not previously recognized in judicial decisions.

4. Justice Rutledge's membership on the Court of Appeals extended from May 2, 1939, to February 15, 1943, the date of his induction to the Supreme Court.

Supreme Court. It is these opinions, moreover, which caused his elevation to the highest tribunal. No factor of political or personal influence, but simply recognition of his judicial work, led to his nomination.

II

Judicial solicitude for the interests of litigants has received specific expression from Justice Rutledge. In one case,[5] involving the administrator of an estate and his sister who were held liable to account for the profits from an informal business arrangement which they had effected for the benefit of their nieces and nephews who were the beneficiaries, the responsible parties were commended for their diligence and assured of their moral innocence. At the same time they were held to their obligation—a hard case was not permitted to make bad law. The same type of solicitude led to a nine-page opinion in another case involving a family controversy, which carefully outlined the facts, weighed the arguments and counterarguments, reviewed the applicable law, and reached a conclusion to which two pages of text might have led at the hands of a less conscientious judge.[6]

A consciousness that law exists for the sake of the interests that may be vindicated and protected by means of it is everywhere evident in Justice Rutledge's opinions. This it was, rather than the compulsions of logic, which led him to the view, not shared by his brethren on a three-judge court, that a Municipal Court landlord's judgment for rent, entered over a defense which alleged negligence causing damage in excess of the claim, was not res judicata in the District Court in the tenant's action for the damage—an action of which the Municipal Court did not have jurisdiction.[7] Despite the majority's contention that to disregard res judicata in such a situation amounted to an assertion of "the judicial powers of an oriental caliph," Justice Rutledge wished to avoid creating a "landlord's paradise" in which an action for rent would either proceed unopposed to a speedy judgment or, if defended on the ground of counter-liability,

5. Burke v. Canfield (Apr. 17, 1940) 74 App. D. C. 6, 111 F. (2d) 526.

6. Fox v. Johnson & Wimsatt, Inc. (Feb. 9, 1942) 127 F. (2d) 729. See also the careful opinion in Jordon v. Bondy (July 29, 1940) 72 App. D. C. 360, 114 F. (2d) 599, a habeas corpus proceeding in behalf of a life prisoner which was said to have the "earmarks of a fishing expedition" to bring about the discovery of some violation of constitutional right, and in which the contentions were all without merit.

7. Geracy, Inc. v. Hoover (Dec. 14, 1942) 133 F. (2d) 25.

would result in defeat of the tenant's claim or at best in defeat of the landlord's in a forum in which there was no possibility of affirmative relief for the tenant. Congress, thought the Justice, did not intend to produce such results by the Act setting up the Municipal Court. Moreover, the authorities in regard to res judicata really mean that a court in order to have competence to foreclose a right to relief must be competent to afford the same relief—not merely to pass upon the same issue for some other purpose. Absent such competence, res judicata cannot arise. And, characteristically, the point is clinched by a quotation from a cited law review article.[8]

Justice Rutledge's significant opinions on procedural questions spring from the same principle that substantive interests are to be protected rather than fortuitously defeated by a heedless, mechanical application of rules.[9] An opinion, holding upon pretty clear authority that the local law which does not provide for service of process upon a partnership as an entity prevails in respect to local causes as against a more liberal provision of the Federal Rules, seems more in character by reason of its final paragraph, which points out that important questions of the incidence of liability would require resolution if the entity theory were to be applied to partnerships and unincorporated associations—a problem more meet for legislative than for judicial resolution.[10]

In Justice Rutledge's eyes the substantive law as well as the procedural should be vigilantly maintained and if necessary developed in order to safeguard ethically valid or legislatively preferred private rights. Thus, the possibility of equity receiverships of corporations is held to continue in the face of statutory provision for receiverships in dissolution cases, because sometimes a business can be saved or at least operated for a period

8. Id., dissenting opinion, n. 14.

9. Sherwood Brothers v. District of Columbia (Apr. 29, 1940) 72 App. D. C. 155, 113 F. (2d) 162 (90-day period for filing claim for refund of taxes extends to 91st day when 90th day falls on Sunday); dissent in Joerns v. Irvin (May 6, 1940) 72 App. D. C. 170, 114 F. (2d) 458 (trial court should be held to have discretion to allow bill of exceptions after the time set by rule for its submission, in view of language susceptible to this construction: "Courts should seek all reasonable opportunity to avoid an interpretation which deprives one of the parties of his day in the appellate court on the merits of the appeal.")

10. Fennell v. Bache (June 30, 1941) 74 App. D. C. 247, 123 F. (2d) 905, cert. den. 314 U. S. 689.

to the benefit of all concerned.[11] The rule that a trustee may not deal with the trust property to his own profit "may be a vestigial reflection of an ancient morality. But . . . . the old line should be held fast which marks off the obligation of confidence and conscience from the temptation induced by self-interest."[12] The right of the purchaser to an automobile, bought from a dealer's stock without knowledge of the recorded chattel mortgage of a finance company, prevails as against the finance company, which contributed to the appearance upon which the purchaser naturally relied.[13] The statutory immunity of a debtor from suit upon secured notes more than three years after their maturity is not to be defeated by holding that the statute of limitations is tolled through the action of the trustee under the deed-of-trust in foreclosing the mortgaged property and applying the proceeds to the debt, merely because the debtor's advance consent to the foreclosure is dressed up in the deed-of-trust as the basis of an "agency" to act in his behalf. Realistically speaking, the trustee acts on behalf of the creditor and the payments which he effects are not voluntary on the part of the debtor.[14] The action of malicious prosecution, already extended to include wrongful institution of civil actions under certain circumstances, should be extended farther to include wrongful instigation of administrative proceedings under some conditions. In the particular case the proceedings were for the revocation of an occupational license, by which the plaintiff's livelihood was threatened, without probable cause to proceed and with malice.[15]

Solicitude for legitimate interests is matched in Justice Rutledge's opinions by ability to perceive and state clearly the merits of complicated fact situations. The basis of the conclusions reached is not left to inference or sketchy statement but is carefully spelled out in a manner which, however consuming of time, carries conviction and gives assurance that the evidence has been conscientiously weighed. Two opinions in appeals from decisions of the National Labor Relations Board, one a partial dissent, are

11. National Benefit Life Insurance Company v. Shaw-Walker Company (Jan. 8, 1940) 71 App. D. C. 276, 111 F. (2d) 497, cert. den. 311 U. S. 673.
12. Earll v. Picken (Apr. 15, 1940) 72 App. D. C. 91, 113 F. (2d) 150.
13. Fogle v. General Credit, Inc. (June 30, 1941) 74 App. D. C. 208, 122 F. (2d) 45.
14. Hoffman v. Sheahin (Apr. 7, 1941) 73 App. D. C. 374, 121 F. (2d) 861.
15. Melvin v. Pence (June 30, 1942) 130 F. (2d) 423.

outstanding in this regard. In the one case, speaking for the Court, Justice Rutledge devoted 12 pages to a convincing review of the evidence which sustained a Board finding that a closed shop contract was the product of company assistance to the union with which it was made.[16] In the other, dissenting, he reviewed a long history of intercorporate relationships which justified the Board's conclusion that a parent company was chargeable with the unfair labor practices of the officials of its subsidiary.[17] Another excellent example is *Burley Irrigation District v. Ickes,*[18] in which the complicated story of the interests of two irrigation districts in the water supply and the electric-power by-product of a reclamation dam is beautifully told. The same care and clarity appear in patent cases, of which *Abbott v. Shepherd*[19] is perhaps the best example.

Detailed analyses of facts are matched in some of Justice Rutledge's opinions by elaborate reviews of the law. What constitutes a final settlement of accounts under a public construction contract is pretty conclusively set forth with reasons and authorities in a case involving the point.[20] With perhaps needless elaborateness, the law of appropriation of corporate names is expounded and related to that of trade marks and trade names in another opinion which leaves no doubts in the reader's mind.[21]

At least five of Justice Rutledge's opinions upon debatable points of private law[22] fall properly in the category of masterpieces. Three of these involve questions of tort liability, one concerns the scope of the category of injuries "arising out of" employment in workmen's compensation, and one discusses the essentials of jurisdiction over foreign corporations in actions brought against them. In each of them the issue is sharply put, the authorities are fully reviewed, the reasons pro and con are weighed, and a conclusion which carries the law forward in

16. International Association of Machinists v. National Labor Relations Board (Nov. 20, 1939) 71 App. D. C. 175, 110 F. (2d) 29, aff. 311 U. S. 72.

17. Press Co. v. National Labor Relations Board (Dec. 9, 1940) 73 App. D. C. 103, 118 F. (2d) 937, cert. den. 313 U. S. 595.

18. (Sept. 30, 1940) 73 App. D. C. 23, 116 F. (2d) 529, cert. den. 312 U. S. 687.

19. App. D. C., Dec. 31, 1942.

20. United States Casualty Company v. District of Columbia (Oct. 9, 1939) 71 App. D. C. 92, 107 F. (2d) 652.

21. Lawyers Title Insurance Company v. Lawyers Title Insurance Corporation (Oct. 16, 1939) 71 App. D. C. 120, 109 F. (2d) 35, cert. den. 309 U. S. 684.

22. Including the law of workmen's compensation.

a desirable direction, consistent with its past, is announced or strongly urged.[23]

In the earliest of the three tort cases the facts were that the police commandeered a newspaper delivery truck and its driver for the pursuit of a traffic violator. During the chase the vehicle, allegedly driven with negligence by its operator, struck the plaintiff. The defendant was the owner of the truck. The majority of the three-judge court held that since the truck had left its route on a public errand and the driver was not at the time acting for his employer, liability could not attach to the defendant. Justice Rutledge contended in his dissenting opinion for the view that if the plaintiff could establish the high degree of negligence that would be necessary to liability under the circumstances, a corporate principal, like a negligent individual in an otherwise similar case, should be held to answer for the injury inflicted. Corporations, said he, act only through agents. It has long ago been settled that their liability for consequences is not limited to situations in which the discharge of strictly corporate functions, falling squarely within their corporate powers, has given rise to damage. Why, then, decline to impose liability for the results of attempting to discharge a duty of citizenship—one which corporations "should share . . . . with men and women of flesh and blood"? It is idle to say that the driver stepped beyond his employment in responding to the policeman's orders, for "he was the Star itself, giving body and action to its incorporeal being, and discharging one of its highest obligations of corporate citizenship." The argument is neatly turned and aptly phrased—sound in logic and in practical consequences.[24]

In *The President and Directors of Georgetown College v. Hughes*,[25] decided two years later, Justice Rutledge spoke for three of the judges of the six-judge Court of Appeals bench in respect to the basis of the liability of a charitable corporation to a special nurse on duty in its hospital for injury inflicted through the negligence of its employees. The other three judges held that the plaintiff, employed by a patient, was a "stranger"

23. In four of these cases Justice Rutledge spoke for the Court; in one he dissented.

24. Balinovic v. Evening Star Newspaper Company (May 6, 1940) 72 App. D. C. 176, 113 F. (2d) 505, cert. den. 311 U. S. 675.

25. (June 30, 1942) 130 F. (2d) 810.

to the defendant and that therefore the court below had properly permitted the case to go to the jury on the merits; in another suit, not involving a stranger, a different question might be presented. Justice Rutledge and Justices Edgerton and Miller, for whom he spoke, were not content with such a half-way decision; for them the occasion was one for sweeping out the entire doctrine of the non-liability of charitable corporations in tort—or, rather, for not permitting it to enter the District of Columbia where the case was one of first impression. The foundations and the superstructure of the doctrine were examined and found to be unsound; all the law and the prophets were cited, reviewed and analyzed; and the practical consequences of imposing liability were traced.

Individuals who engage in charity are liable for their negligence and for that of their servants, reported Justice Rutledge. Even the physician who serves in a hospital may be held to answer for his negligence. Individual trustees of an unincorporated trust may be personally liable, although the trust fund may not be. But when a charity incorporates, "somehow charity plus incorporation creates a certainty of immunity neither can attain apart from the other." The trustees become directors whose position "shuts off recourse to their assets." The corporation's only assets are those created for the charitable purpose. Confronted with a situation in which, under the rule of immunity of the charitable fund, the victim is stripped "of all claim except against the negligent actor," the courts have twisted and turned, producing a body of decisions which is characterized by "paradoxes of principle, fictional assumptions of fact and consequence, and confused results." Limitations and exceptions render it "doubtful that the so-called 'rule' of full immunity ever represented the prevailing state of decision in this country." After reviewing all the distinctions and the policies which underlie them, Justice Rutledge concludes that none of them are sound. In "scholarly treatment outside the courts," on the other hand, substantial unanimity of opinion exists "in support of liability and against immunity." In language destined to be often quoted, the opinion pays tribute to the critical function of legal scholarship and contends that "when opinion among scholars who are not judges is uniform or nearly so and that among judges is in high confusion, the former gives direction to the law of the

future, while the latter points presently in all directions. In such circumstances scholarly opinion has more than merely persuasive effect." In the modern world, moreover, private charities, of whose service to the community and whose problems Justice Rutledge and his associates were mindful, can make adjustments, especially through insurance, to take care of the burden of liability. This is preferable to having the victim bear the full burden of his injury.

The books probably do not contain a finer example of conscious judicial law-making than the opinion in the Georgetown hospital case. Free of pretense and with full awareness of all the ramifications and implications of the problem involved, the judge, mindful of his responsibility to the past and to the future, to logic and to policy, achieves a sound result, breathing new life into the ancient body of the law.

The Georgetown hospital opinion, however, merely declined to follow the doubtful doctrine of other American courts in a jurisdiction "where the question has never been determined." In the next of Justice Rutledge's major tort decisions there was a clean break with an applicable precedent—conceivably distinguishable on the facts but not in the scope its doctrine was intended to have. The rule that a release or a covenant not to sue, given by the injured party to one of two joint tort feasors, releases the other tort feasor, was abandoned, as the rule that contribution will not be allowed among joint tort feasors had been the year before. "The majority,"[26] said Justice Rutledge, "are not unmindful of the force of *stare decisis*. But it is not a doctrine of mortmain. It does not exclude room for growth in the law, nor does it require adherence to a highly technical rule which, at its inception, was at war with the elementary nature of the substantive liability to which it was applied; which has been maintained by lip service, while being chipped away in its substantive effect through multiplying or equally artificial distinctions; and which has found hold in our own law by only a single and highly ambiguous decision."[27]

The opinion's breach with precedent was of greater moment than the foregoing quotation reveals; for, according to the dis-

26. Justice Stephens dissented; Justice Vinson joined in Justice Rutledge's view.

27. McKenna v. Austin, App. D. C., Feb. 11, 1943.

sent, the previous decision, only nine years old, had been reached by an undivided court as the result of conscious choice between two conflicting views expressed in other jurisdictions, "and the choice was not without basis in reason and practical justice." The court, said Justice Stephens, should not swing lightly "from one doubtful rule to another." Such "change of decision as a result of change of personnel in the courts saps confidence in the law as an objective standard of decision." But the Rutledge opinion is confident; searches the reasons and the authorities, including the recent law review discussions; and charts a tentative course through the admitted difficulties that will result with respect to contribution following a settlement by one joint tort feasor with the injured party. There is small danger, following such an example of bold judicial technique, that Mr. Justice Rutledge will fail as a member of the Supreme Court to play his part in keeping the law of the Constitution abreast of the needs of the times. The developments which he sponsors, moreover, will be openly stated, with the difficulties recognized and the consequences laid bare. Subterfuge and evasion play no part in his opinions.

In his major workmen's compensation opinion[28] Justice Rutledge established for the District of Columbia the proposition that compensation is payable for injury arising from a quarrel of a personal nature during the course of employment, brought on by contacts at work, to which the claimant was a party. The opinion reviews the developing law of the subject, with its "recognition that work causes quarrels and fights." It "causes frictions between" workmen, "creates occasions for lapses into carelessness, and for fun-making and emotional flare-up." The resulting risks of injury are "inherent in the working environment," whether or not the injured party participates in the quarrel which gives rise to his injury, provided "the accumulated pressures .... [are] attributable in substantial part to the working environment," as they were in the case in hand. "Any other view would reintroduce the conceptions of contributory fault, action in the line of duty, nonaccidental character of voluntary conduct, intervening cause in tort law, which it was the purpose of the statute to discard." Again the perceiving judge is able,

28. Hartford Accident and Indemnity Corporation v. Cardillo (Mar. 11, 1940) 72 App. D. C. 52, 112 F. (2d) 11, cert. den. 310 U. S. 649.

by reason of his understanding of human conduct, to maintain the law true to its purpose against the temptation to spin out doctrine to "drily logical" conclusions.

In *Frene v. Louisville Cement Company*,[29] as in the other cases just reviewed, the method of developing a new rule of law is that of laying bare the prior law of the subject, examining its foundations, and reaching a conclusion which carries out underlying social purposes. In this case the opinion reaches beyond the confines that would have sufficed for a decision, in order to set the law aright. Service of process in a damage action for false representations against a corporate defendant had been had upon a sales representative in the District of Columbia. The defendant, a Kentucky corporation, had no other representative in the District and maintained no office there. The representative concluded no contracts, but he solicited business, took orders, and checked upon the installation of the defendant's product upon construction work. Justice Rutledge's opinion rests the ultimate conclusion that the service of process was sufficient upon the view that the acts of the defendant's representative went beyond that "mere solicitation" of business which, according to a "tradition" that has grown, would not suffice to confer jurisdiction. But the "tradition" itself is repudiated as to situations in which "the soliciting activity is a regular, continuous, and sustained course of business." It "crystallized when it was thought that nothing less than concluding contracts could constitute 'doing business' by foreign corporations, an idea now well exploded." Judicial and legislative developments have recognized many types of acts, such as maintaining a warehouse, making deliveries, and operating a motor vehicle as grounds of jurisdiction, aside from any conclusion of contracts. Why not, then, the continuous solicitation of business? The argument is unanswerable except on the basis of precedents uncritically accepted; and it is beautifully put.

When law is developed by courts through choice of conflicting policies of present-day applicability, disagreement is certain to arise at times among judges and between judges and outside critics, with neither side able to down the other conclusively. The second of two related opinions of Justice Rutledge's in marital cases gives effect to a view with regard to the fruits of

29. App. D. C., Jan. 25, 1943.

subversion of a state's divorce laws with which many will be unable to agree. The first opinion, in an annulment action in which a husband attacked the validity of his wife's prior divorce from her previous husband because of her non-residence in the state where it was obtained, held that the plaintiff was estopped to question the divorce because of his own complicity in its obtainment.[30] In the second case[31] the husband who sought to deny the validity of his wife's prior divorce was the defendant in an action for limited divorce. His "wife," did not deny that her previous "divorce" had been procured despite lack of residence on her part in Virginia where the decree was obtained. Nevertheless the Court of Appeals reversed a trial court decision dismissing the complaint and ordered further proceedings in which full effect should be given to the law of laches and estoppel as against the defendant, who had participated in the fraud by which his "wife" had become, as they assumed, free to marry him. Justice Rutledge, concurring, would have preferred to enter an order which applied the doctrine of laches and estoppel adversely to the defendant. In his eyes the parties, who apparently thought at the time that the Virginia decree was valid, "were more victims of a legal system of divorce at war with social convention" than offenders. The courts, therefore, should not take away the fruits of their illegal action, even though they admittedly stood on an equal footing morally and the "wife" was now asking the courts to secure to her by decree the benefits which her partner was no longer willing to accord voluntarily. The concurring opinion expresses tolerance of a social convention which has been unable to obtain legislative recognition, as against the desire of states to retain control of the marriages of their domiciliaries and to refrain from exerting control over the marriages of those residing elsewhere. It thus seems willing to accept subversion of law in place of change in the law. Those who take an opposite view, as did Justice Miller in his dissent, seem for the present, however, to be on the losing side with respect to a group of related issues.[32] Occasion may arise while the present majority of the Supreme Court upon these issues yet remains, to determine how far nullification may

30. Saul v. Saul (July 21, 1941) 74 App. D. C. 287, 122 F. (2d) 64.
31. Ruppert v. Ruppert, App. D. C., Dec. 15, 1942.
32. Williams v. North Carolina (1942) 317 U. S. 287.

go and to reconcile more fully, if that is possible, the tolerance of it with devotion to orderly institutions. That all might agree upon Federal control of divorce as a solution does not obviate the necessity of workable adjustments in its absence. Judicial philosophy requires development at this point.

Equally as essential to the function of the judge as the resolution of difficult issues of fact and the wise development of law, is the discerning application of existing rules of law to the states of fact that arise in the cases. Here too Justice Rutledge's opinions reveal ability of the first order. The existence of an entity subject to the Federal income tax in the form of a business trust designed to gather funds from subscribers and lend them to a financially weak trust company;[33] the "ownership" of an automobile by a finance company having possession in advance of foreclosure, for the purpose of attaching statutory liability for its negligent operation with the consent of the company;[34] the absence of "intent to deceive" and materiality to the risk in connection with factually false statements in an application for life insurance:[35] these determinations are among the more noteworthy examples in the opinions of the application of legal concepts (statutory in each instance) in a manner which gives effect to the underlying purpose rather than simply to the dictionary meanings of words. None of the determinations does violence to language; but all of them in the hands of a less skillful judge might have been made the other way with resulting frustration of legislative intent.

The case, having an opinion by Justice Rutledge, which turns most clearly upon the application of an existing rule to particular facts, is *American Security and Trust Company v. Frost,*[36] where the question was whether a rule of construction, calling for the allocation to the corpus of stock dividends accruing to a trust, was applicable to a particular testamentary trust. Concededly the rule would not apply as against a contrary testamentary

33. Fidelity-Bankers Trust Company v. Helvering (Mar. 4, 1940) 72 App. D. C. 1, 113 F. (2d) 14, cert. den. 310 U. S. 649.

34. Mason v. Automobile Finance Company (Mar. 17, 1941) 73 App. D. C. 284, 121 F. (2d) 32.

35. Prudential Insurance Company v. Saxe (Jan. 25, 1943) 134 F. (2d) 16.

36. American Security and Trust Company v. Frost (Nov. 25, 1940) 73 App. D. C. 75, 117 F. (2d) 283, cert. den. 312 U. S. 707. The case involves also the question of the proper allocation of income earned by the estate while it was under administration.

intent. In the will the trustees, two of whom had drawn it as the testatrix's attorneys and long-standing trusted advisors, were empowered "to decide finally any question that may arise as to what constitutes income and what principal," with a precatory direction, however, to decide such matters "whenever feasible . . . . in favor of the life beneficiaries." The individual trustees, against the opposite view of a third corporate trustee, had so decided in respect to the stock dividends in question and had been sustained by the District Court. Nevertheless the majority of the three-judge Court of Appeals held that the contrary rule of construction must prevail "in the interest of certainty." The testatrix "is presumed to have been familiar with" the rule and to have intended it to govern. Justice Rutledge, dissenting, argued strongly for the contrary view, pointing out that the decision of the court "disregards the testatrix's expressed confidence in the business judgment of her . . . . fiduciaries, narrowly restricts their discretion . . . . and thereby defeats both her purpose of favoring the life beneficiaries widely, and that of avoiding litigation."[36] It would be difficult to imagine a case which presents more sharply the difference between a use of legal rules to maintain verbal uniformity and one which focuses upon the actualities involved, seeking to produce a smooth administration of law in harmony with the purposes to be served.

III

Distinctive as is the quality of Mr. Justice Rutledge's Court of Appeals opinions in cases which bear most largely upon private interests, it by no means overshadows in importance the superb analysis and striking thought of his strictly public law decisions, which are so directly indicative of his probable role upon the Supreme Court. And, indeed, the same qualities of laying bare the essential issues, examining into the purposes of the relevant rules of law, and deciding cases in such a manner as to promote desirable ends, are manifested in the public law as in the private law opinions. The most noteworthy of the former deal with (a) certain problems of criminal procedure, (b) problems of statutory construction in connection with certain regulatory legislation, (c) the judicial review of administrative decisions, and (d) the constitutional guaranties affecting freedom of speech and religion.

No bias in favor of either the state or the accused is discernible in Justice Rutledge's opinions on points of criminal procedure. An accused who had had a fair trial did not obtain from him a reversal in disregard of a fine but very real distinction, which the trial court had observed. The court permitted the impeachment and rebuttal of a defense witness through evidence that the witness, who had been present at the crime, once stated the defendant was guilty. This was held to be different from attempting to bring out that such a witness at some previous time expressed a conclusion to the same effect, going beyond the facts observed.[37] In another case the double jeopardy rule was not permitted to avoid a sentence, originally stated incorrectly by the trial judge and immediately afterward corrected, merely because the prisoner had left the court room and entered an elevator in the courthouse before the correction was made.[38] On the other hand the right of cross-examination to test the soundness of an expert witness's reasoning was zealously protected in a third case.[39] In still another case the duty of the trial court to "positively and fully inform the accused concerning his basic rights" to an appeal *in forma pauperis*, "especially when he is not represented by counsel," was vigorously asserted and, in addition, the court was held to be under a duty to treat an ordinary letter from the prisoner, confined in jail, as the filing of an appeal where the letter contained a clear request. The opinion is a far cry from the days when technicalities of criminal procedure were rigidly enforced.[40] In all of these cases Justice Rutledge clearly had his eye upon the essential needs to be met by the procedural device or judicial duty involved in the decision, whether those needs related to the accused's right to a fair trial and appeal or to the effective ascertainment of facts.

The *Boykin* case in a sense foreshadows by its solicitude for the prisoner who is without counsel the later case of *Wood v. United States*,[41] in which the opinion is in some respects the finest that has come from Justice Rutledge. The appellants were con-

37. Ewing v. United States, App. D. C., Dec. 1, 1942, cert. den. (1943) 11 U. S. L. Wk. 3243.
38. Rowley v. Welch (July 22, 1940) 72 App. D. C. 351, 114 F. (2d) 499.
39. Lindsey v. United States (Dec. 1, 1942) 133 F. (2d) 368.
40. Boykin v. Huff (Apr. 7, 1941) 73 App. D. C. 378, 121 F. (2d) 865.
41. (March 9, 1942) 128 F. (2d) 265, 141 A. L. R. 1318.

victed in the court below of robbery. There had been received in evidence against them an admission of guilt which arose from "pleas of guilty" upon the preliminary hearing in Police Court. They were without counsel at the time. No claim was made that coercion had been used, but the defendants asserted that the guilty pleas were without knowledge that the questions which elicited them related to anything more than certain misdemeanors not in issue on the appeal. They were not advised of their right to counsel or that they need not answer the questions. At the trial the evidence concerning guilt was in conflict. A plea of not guilty was entered upon arraignment.

In going to the authorities Justice Rutledge found that they confused the privilege against self-incrimination with the rule of evidence which bars involuntary confessions. They "smeared the signboard arrows to the next case, which is ours." The rule against the admission of involuntary confessions properly applies, however, where physical coercion is used and not where, as here, the admission of guilt was in open court and the circumstances "practically guarantee . . . . that it is not obtained by the more violent forms of force or duress which nullify the value of out-of-court confessions." The privilege against self-incrimination applies at the trial stage of a criminal proceeding, at which the accused could not be made to state whether he was guilty or not guilty. It applies also to exclude from evidence a plea of guilty upon arraignment, later superseded by a plea of not guilty. Other reasons than the privilege are advanced to justify the exclusion of the plea upon arraignment, but upon examination they are found not to be the true ones. The essence of the matter is that the privilege "protects against the force of the court itself. It guards against the ancient abuse of judicial inquisition." The judge upon preliminary hearing, as well as at later stages, sits as a court, "to decide between the informer or prosecutor and the accused on the preliminary question of his temporary restraint . . . . The hearing is judicial. It should be so in essential procedure." The court's statutory power to question the accused, backed with the sanction of contempt, "goes no further than is constitutionally permissible in a judicial proceeding." The hearing should not "be made a trap for luring the unwary into confession or admission which is fatal or prejudicial." To hold to the contrary would render the protection of

the privilege illusory. "The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at the trial." To rob an admission of guilt at the preliminary hearing of the character of compulsory self-incrimination it is at least necessary to "advise the accused in all cases, before permitting him to speak as a volunteer, of his right to counsel and .... warn him that he need not speak and, if he does, it is at his peril." Whether an admission procured after such a warning could be received in evidence may be left to future decision; but the convictions in this case are reversed.

Justice Rutledge recognizes that there is room to question the policy of the privilege against self-incrimination; but, "With world events running as they have been, there is special reason at this time for not relaxing the old personal freedoms won, as this one was, through centuries of struggle. Men now in concentration camps could speak to the value of such a privilege, if it were or had been theirs. There is in it the wisdom of centuries, if not that of decades."

In this case outstandingly Justice Rutledge displays the ability to state essential issues, to penetrate to the foundations of rules of law, and to decide particular issues in the light of underlying policy. Where these qualities appear in a case involving constitutional issues of high import, their value becomes all the more evident. In this instance they produced an opinion which illuminates a subject heretofore confused and forms a new starting point for future legal reasoning with reference to it.

In regard to statutory construction Justice Rutledge received an early opportunity in one of the now-famous District of Columbia Group Health cases to apply the technique of following the guidance of legislative purpose in judging the effect of a statute.[42] The issue was whether the Group Health Association, a medical cooperative, was violating the District of Columbia Code by carrying on its activities without becoming licensed and otherwise observing the statutes applicable to insurance companies. For a fixed fee the Association undertook to make available to its members fairly complete medical services as needed, thus

42. Jordan v. Group Health Association (Sept. 11, 1939) 71 App. D. C. 38, 107 F. (2d) 239.

undoubtedly distributing a portion of the risk of ill health equally among the subscribers. However, concluded Justice Rutledge, the activities of the Association "more truly . . . . constitute the quantity purchase of well rounded, continuous medical service by its members. The functions of such an organization are not identical with those of insurance or indemnity companies. The latter are concerned primarily, if not exclusively, with risk and the consequences of its descent, not with service, or its extension in kind, quantity or distribution." There is a difference between contracting "for the rendering of service, even on the contingency that it be needed, and contracting merely to stand its cost when or after it is rendered." Turning to the statutes, "Obviously it was not the purpose . . . . to regulate all arrangements for assumption or distribution of risk. That view would cause the statutes to engulf practically all contracts, particularly conditional sales and contingent service agreements . . . . The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose." The conclusion followed that Group Health was not proceeding in violation of the District of Columbia Code.

There is much more to the opinion than has just been summarized. The conclusion is followed by a review of the authorities. On the whole they sustain the result, but some are not without their difficulties, particularly those relating to burial associations, the majority of which "classify such arrangements as insurance." In the first part of his opinion Justice Rutledge has, however, laid the groundwork for characterizing these decisions as "clearly not in point." The burial associations assume a "definite and binding" obligation to supply the burial service, whereas the opinion has meticulously pointed out that Group Health has been careful to agree only to use its best efforts to obtain medical services for its members, assuming no liability for failure to succeed unless, indeed, the Association does not put forth adequate effort to comply with its obligation.[43] Jus-

43. The opinion asserts that the contract of Group Health with its members bears "some relation" to a collective labor agreement. Except where a union undertakes to supply workers to employers or the employers to furnish employment, the analogy seems remote. The ordinary collective labor agreement provides terms and conditions which become operative only with the independent formation of contracts of employment; under the Group Health contract the Association undertakes to make the arrangements for the services to be rendered by physicians.

tice Rutledge is not entirely happy with so "tenuous" a "literal obligation" nor does he assert that it would necessarily stand the attack of a member; but he is convinced that it is a far cry from the duty of the Association to the obligations of an insurer, including a burial society. One hopes that the attorneys for the latter will not take their cue for the future from this aspect of the Group Health decision. If they do, the same judicial skill which the opinion manifests will find ways to circumvent them. The present importance of the case lies in the realistic new start which it gives to further consideration of the legal status of cooperatives. The difficulties that reside in adjusting the new law to old emphasize the path-breaking character of the adjudication involved.

Outstanding among Justice Rutledge's opinions in regard to the construction of regulatory legislation is his last in the Court of Appeals.[44] The issue was over the discretion of the National Mediation Board to prescribe less than a carrier-wide unit for collective bargaining between a railroad company and, in the language of the Railway Labor Act, "any craft or class" of its employees, when "any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act." When "individuals or organizations" have been designated and certified to "the carrier," the carrier is obligated by the statute "to treat with the representative so certified as the representative of the craft or class."[45] The majority of the three-judge court argued from the predominant use of the singular in the statute with respect to "craft or class" and "representative" and from the statutory emphasis upon the "carrier," that it was the intention of Congress to make the carrier-wide unit of bargaining mandatory whenever a dispute arose involving that as against a geographical subdivision of the carrier for bargaining purposes. Its view was borne out by the testimony before the House Committee on Commerce of Mr. Joseph B. Eastman, then Federal Coordinator of Transportation, at the time the Act was pending. The National Mediation Board itself had taken the same view, thus avoiding a decision upon the

44. Switchmen's Union of North America v. National Mediation Board, App. D. C., Feb. 15, 1943. A companion case, in which he also had a brief opinion, was decided immediately afterward.

45. 45 U. S. C. §§151-153.

merits in the controversy that had been brought before it and, as a result of a carrier-wide election upon the New York Central Railroad which it ordered, displacing the Switchmen's Union of North America by the Brotherhood of Railroad Trainmen as the representative of yardmen in certain divisions of the Railroad's system in which the former union had long had contracts.

Justice Rutledge, dissenting, pitted his reason against the imposing array of contrary opinion. He pointed out that the result went "far to destroy, rather than to promote, that peace in labor relations and the uninterrupted service of the carriers which were the statute's declared and primary objects . . . . It throws the whole weight of the legislation in favor of the big unions as against the smaller ones." Any "dispute" results automatically in the ouster of the smaller union in an election in which the Mediation Board "becomes merely an election judge." The terms of the statute, said Mr. Justice Rutledge, do not "comport with such an intention." The Act contains no definition of "craft or class." The language quoted above speaks at one point of "representatives" not less significantly than in the singular at another. In order to provide a means of settling jurisdictional disputes the Act set up the Mediation Board machinery and authorized the Board to "designate who may participate in the election"—having in mind, Justice Rutledge thought, geographical as well as functional designation of employees. The larger purposes of the Act were (1) to give effect so far as possible to the principle of self-organization of railway labor and (2) to provide a means of orderly decision of disputes that cannot be otherwise resolved without either freezing the status quo or causing a "total disruption of existing arrangements." The view of the Board and the majority of the Court withdraws from reasoned decision, based upon evidence regarding the various factors involved, an important class of disputes, relegating them to decision according to an arbitrary rule not expressed or intended in the statute.

Here again judicial statesmanship appears at its best in one of Justice Rutledge's opinions. It seems clear that timidity on the part of an administrative agency, followed by judicial acceptance of plausible but narrow reasoning in regard to the statute's meaning, resulted in a decision by the majority of the Court which cut a large and important class of disputes out from

the salutary procedures of the Railway Labor Act, contrary to the larger purpose and perhaps the specifically-intended meaning of the statute. In contrast, Justice Rutledge would have compelled the Mediation Board to discharge its duty, thus preserving so far as possible by judicial means the provision that had been made legislatively for handling an important segment of the railway labor problem. His opinion exemplifies life-giving statutory construction as distinguished from the type whereby the letter killeth—not less because it is written in a Congressional hearing instead of in the legislative text itself.

Similar attention to the broader significance of an issue appears in Justice Rutledge's opinion for the Court in a case involving the application to Federal officials and employees of a District of Columbia taxing statute embracing "any person . . . . resident . . . . within . . . . [the] District."[46] The taxpayer, whom the District of Columbia Board of Tax Appeals had ruled to be taxable under the statute, had maintained his only abode in the District since coming to it in 1919. He had been employed by the Federal Government continuously since 1928. By declarations of legal residence, voting, payment of poll taxes, and expressed intention to return to his former home in Boston, he had continuously sought to maintain a Massachusetts domicile. No contention was made by the taxing authorities that the statute sought to impose a tax upon persons not domiciled in the District. The question turned, therefore, upon the meaning of domicile for the purpose in hand. Justice Rutledge said at once that the question was different from that which would be presented by one who had remained in the District or elsewhere in order to engage in private pursuits. "Boiled down to its essence, the question here is whether a citizen and resident of a state must surrender his state allegiance for all purposes in which domicile may be controlling when he accepts Federal employment in the District of indefinite or relatively permanent duration. The question is not whether he may do so if he wishes. To hold that he must would create startling consequences, including unjust and untenable, not to say intolerable, discriminations." Illogically, the taxing authorities did not contend that military and naval personnel would surrender state domicils by

46. Sweeney v. District of Columbia (Mar. 11, 1940) 72 App. D. C. 30, 113 F. (2d) 25, cert. den. 310 U. S. 631.

remaining indefinitely in the District; but, it was contended, judicial and administrative personnel and members of Congress who achieve, practically speaking, an indefinite tenure and maintain their only or principal domestic establishments in the capital would. Justice Rutledge rejected the contention vigorously. It would discriminate in favor of those who had sufficient wealth to maintain two homes. It would be inconsistent with the Federal principle. "State attachment is not incompatible with Federal service . . . . Our dual system contemplates a harmony, not an antagonism, of state and national allegiances. Each is the complement, not the antithesis, of the other." The Court was "unwilling to accept a principle implicit in which are consequences so questionable for the national services and welfare and so contradictory of the dual system which postulates allegiance to nation and state" as probable loss of the right to vote in the state of previous domicile without paying heavily for the privilege.

Again the Rutledge opinion gives attention to the essentials at the heart of the problem, rather than to pettifogging verbiage or to analogies that do not fit. Through it there breathes an appreciation of political citizenship and of economic justice in relation to citizenship such as became rather rare during the cynical 'twenties and 'thirties. In these times, when political democracy vitally needs expounders and defenders who see clearly and feel deeply instead of merely render stereotyped lip service, it is a boon to the nation to have so virile an exponent of its essential meaning elevated to the supreme tribunal.

With two other opinions of Justice Rutledge's involving the construction of regulatory statutes this particular commentator finds it less possible to agree wholeheartedly; but the differences are over the wise choice of relevant policy rather than over the method of approach to the problems involved.[47] In *Washington*

47. In still another case, Schlaefer v. Schlaefer (Feb. 5, 1940) 71 App. D. C. 350, 112 F. (2d) 177, a beautifully reasoned opinion which reaches a socially desirable result rests in part upon a questionable stretching of statutory language. A statute exempting disability insurance benefits from execution or other process expressly excepted actions "to recover for necessaries *contracted for* after the commencement of the disability." The opinion holds that the exception covers liability for alimony payments, reasoning persuasively that the purpose of the statute is to protect families as well as the immediate recipients of beneficiary payments. It would defeat this purpose to hold that a necessitous wife could not reach such payments through legal process. It is difficult, however, to maintain that alimony

Terminal Company v. Boswell[48] the National Railway Adjustment Board made an award pursuant to a collective agreement against the Terminal Company with respect to the entitlement of a group of employees to certain work as against the employees of other carriers who were performing it. The question was whether the Terminal might sue for a declaratory judgment to determine the validity of the award. By the Railway Labor Act such awards are enforceable by actions in court in which they become prima facie evidence of the facts found. In such an action costs are not to be taxed against the petitioner and he may be allowed a reasonable attorney's fee if he prevails. The Act was passed one week after the Declaratory Judgments Act.[49] Concededly, under the rule of *Moore v. Illinois Central R. R.*,[50] actions to enforce collective agreements, which may also be given effect through the Railway Adjustment Board's machinery, can be brought without resort to that machinery if the moving party so elects. The Terminal Company here had defended the proceeding before the Board and sought to enter the court below after it had been defeated. Justice Rutledge, speaking for the majority of the Court,[51] held that it could not do so, since it was the intention of Congress to confer upon employees who had won in the Board the procedural advantages secured by the Railway Labor Act, without danger of losing them through victory by their employers in a race for court, made possible by the availability of other remedies. It may be doubted, however, whether Congress intended that the salutary procedures of the Declaratory Judgments Act should yield so quickly and easily to other procedures merely because these also were statutory and salutary in a different way.[52] Nor does it necessarily follow from the creation of procedural advantages by the Railway Labor Act

payments are "contracted for"; and it may be that the legislature actually intended, where marital separation has occurred and been legally sanctioned, to prefer the disability beneficiary over the wife.

48. (Nov. 18, 1941) 124 F. (2d) 235, cert. granted 315 U. S. 795.

49. (1934) 48 Stat. 955, 28 U. S. C. §400.

50. (1941) 312 U. S. 630.

51. Justice Stephens dissented.

52. The Terminal Company was left by the decision in the position of having to undergo the risk of paying twice for the same work, if it guessed wrong upon the ultimate outcome of litigation, without means of securing a judicial determination of its liability until the employees who had won before the Adjustment Board chose to go into court to enforce their award —unless, indeed, the Company should abide by the award and precipitate a proceeding by the workers whom that course of action would displace.

in certain types of proceedings that these must necessarily be given effect to the exclusion of alternative procedures in other types of suits. The purpose of the particular provision of the Railway Labor Act was to secure an inexpensive, fairly certain means of recovering sums legally due to employees. In such actions questions of fact and law must be determined if they have not already been concluded, and the prima facie evidence rule prevails with respect to the former. The plaintiff will ordinarily be an individual or a group of individuals. It does not seem inconsistent with the availability of such means of recovery that other procedures should also exist for determining the underlying questions of liability, at the suit of a carrier or a union. Be that as it may, the technique of Justice Rutledge in his opinion is the same as that in the other cases of statutory construction that have been noted. This method provides no more certain means of getting at answers than any other; it merely leads to results which are predicated upon the significant factors involved, rather than upon less essential ones. Disagreement with a decision does not discredit it but simply results from weighing the factors differently.

In a highly disputable decision involving a point of administrative procedure which received the attention of the entire Court of Appeals bench,[53] Justice Rutledge spoke for four of the justices as against two dissenters[54] in holding that the Federal Communications Commission is required by the Communications Act to admit as a party, entitled as of right to an adequate hearing, a radio station which would be affected through electrical interference, although not financially, by a modification of the license of another station. The statute is badly drawn and fails to envisage clearly the circumstances that will attend the several types of proceedings for which it prescribes. In two sections[55] provision is made for hearing the applicant or licensee in respect to the granting or modification of a license before adverse action is taken, but no mention is made of competing station proprietors. Justice Rutledge finds a basis in the statute for his conclusion by resorting to a third

53. National Broadcasting Co. v. Federal Communications Commission (Sept. 12, 1942) 132 F. (2d) 545, cert. granted (1943) 11 U. S. L. Wk. 3212.

54. Justices Miller and Edgerton.

55. 47 U. S. C. §§309 (a), 312 (b).

section[56] which calls for a "public hearing" before "changes in the frequencies, authorized power, or in the times of operation of any station" may be made without the consent of the licensee—changes flowing, it would seem, from "regulations . . . . necessary to prevent interference between stations," with which the section deals. This section, says Justice Rutledge, applies whenever a license proceeding, whether for a new license or for the modification of an old one, becomes in practical effect a multi-party proceeding. Under it the "station licensee," who may invoke a hearing by failing to consent, is any licensee sufficiently affected; and the hearing when held must be "public" in the sense of enabling every licensee so affected to come in as of right. Actually the Commission had heard the complaining station owner as amicus curiae. As the dissenting opinion of Justice Edgerton points out, it is possible to judge in any case where question is raised, whether a hearing so granted, or the denial of one, accords with due process. If not, a remedy may be afforded. Hence there is no need to "cramp the administrative process" by forcing it into the mold formed by a strained construction of the statute, in order to guarantee by legislation either more than is warranted or no more than administrative discretion would accord. That Justice Rutledge also is solicitous to avoid cramping the administrative process is evident from the care with which he delimits the requirements of the hearing to be extended; but the effect of the decision is to invite litigation, rather than administrative determination, as the means of settling procedural problems.

In respect to judicial review of administrative decisions Justice Rutledge has displayed the restraint which is now regarded as proper for courts, not only in cases already reviewed but also in two additional ones which deal, respectively, with findings of fact in administrative adjudication and with administrative discretion in framing regulations. In the second of the two cases in point of time,[57] the issue was whether the Securities and Exchange Commission's finding, that the American Gas and Electric Company was subject to the "controlling influence" of the Electric Bond and Share Company, and was therefore a

56. Id., §303 (f).
57. American Gas and Electric Co. v. Securities and Exchange Commission, App. D. C., Feb. 1, 1943.

subsidiary of the latter, could stand as against the contention that it was not supported by substantial evidence. The opinion reviews the evidence carefully and defers to "the Commission's expert judgment" in the "weighing of circumstantial evidence and the drawing of reasonable inferences therefrom." In the other case[58] it was sought to enjoin the enforcement of regulations relating to trap fishing for salmon in Alaskan waters, upon the ground that they conferred monopolistic privileges contrary to the policy of the governing statute. The opinion concluded that the function of issuing regulations under the statute "is executive and highly discretionary" and that no basis for interfering with its exercise was shown.

To the public Justice Rutledge probably is known for the moment more generally as the proponent of freedom of speech and religion under the First and Fifth Amendments than for any other of his judicial accomplishments. The basis for his identification with this aspect of the cause of constitutional liberty is his dissenting opinion in the case of *Busey v. District of Columbia,*[59] coinciding in its views with the dissent of Chief Justice Stone in the first decision of *Jones v. Opelika*[60] by the Supreme Court. It is now history that the vote of Mr. Justice Rutledge when *Jones v. Opelika* was reconsidered, following his elevation to the Supreme Court, resulted in the final victory of the view which he sponsored.[61] The technique and the substance of his opinion are an index of major significance to his quality as a judge of constitutional issues.

The constitutional question which was presented in *Busey v. District of Columbia* was not an easy one to resolve. It related to the validity of applying a general occupational licensing statute to the distribution of literature upon the streets by the religious sect known as Jehovah's Witnesses. The statute was not aimed at them and had not been applied in a discriminatory manner. The fee for selling upon the streets was five dollars for a fraction of a year. Money was received by the distributors, but whether as a price or as a contribution was one of the points

58. Dow v. Ickes (Aug. 4, 1941) 74 App. D. C. 319, 123 F. (2d) 909, cert. den. 315 U. S. 807, rehearing den. 315 U. S. 830.

59. (April 15, 1942) 129 F. (2d) 24, cert. granted (1942) 11 U. S. L. Wk. 3075.

60. (1942) 316 U. S. 584, rehearing granted (1943) 63 S. Ct. 658.

61. Jones v. Opelika (1943) 11 U. S. L. Wk. 4326.

in dispute. Admittedly the literature might be had without the payment of money; but the sum to be asked was fixed.[62] One gave it or not as he chose.

Justice Rutledge differed from his brethren upon a number of points: (1) in regarding the transactions by which the literature was distributed as part of a non-business missionary endeavor not covered by the statute; (2) in concluding that the licensing statute, some sections of which were manifestly regulatory of established businesses and inapplicable to the Witnesses' activities, was not severable and that, as a matter of statutory interpretation, none of it could properly be applied to the activities in question; and finally (3) in contending that, if the statute were regarded as applicable, its enforcement as against these activities was violative of freedom of utterance and of religion and hence was void. The second point, if valid, would decide the case without resort to the third; but Justice Rutledge was not to be defeated by his own argument from speaking out upon the constitutional question. The majority insisted that the statute was serverable and that the section which levied the fee was applicable and valid; he must meet them on their own ground.

The statute as a whole was regulatory. If certain of its regulatory sections applied, it was void as against the Witnesses because of the unlimited discretion which it conferred upon the Commissioners of the District of Columbia to impose regulations upon licensees and to revoke licenses. Such uncontrolled power of censorship over public utterance had already been held unconstitutional.[63] But, argued Justice Rutledge, even if these regulatory sections were to be regarded as inapplicable, the fee-levying section should be deemed invalid as against the Witnesses' activities. Included in the fee was a charge for the use of the streets. No such tax can be levied. "Taxed speech is not free speech. It is silence for persons unable to pay the tax . . . . The Stamp Tax was co-parent, with 'precious license', of the First

62. Mr. Justice Jackson was later to bring out in his dissent in Douglas v. City of Jeannette (1943) 63 S. Ct. 882, that the distributors of the Witnesses' literature obtain a sufficient margin upon the copies for which they receive a return to maintain themselves from the proceeds. This fact does not necessarily make each transaction which results in payment a sale, but it does render the activity as a whole economically advantageous, however modestly, to those who engage in it.

63. Cantwell v. Connecticut (1940) 310 U. S. 296.

Amendment." And, sweeping aside all previous distinctions insisted upon in the dissenting opinion, Justice Rutledge went on to assert that, "Whether defendants were soliciting donations or technically making 'sales' in my opinion is not material. In either event this phase of their activity was merely an incident of the right to spread religious ideas and information. If they had the right to do this free from such restrictions as the statute imposed and without receiving funds, it was not taken away by accepting these small donations or payments, however they are regarded."

Appreciation of the boldness of the assertion of this view by a single dissenting justice in April, 1942 is already blunted by the victory which followed. The decision was handed down two months before the Chief Justice of the Supreme Court raised his voice in the same cause,[64] and after only faint state court authority looking in the same direction. The opinion broke new ground—vigorously, cleanly, because "This is no time to wear away further the freedom of conscience and mind by nicely technical or doubtful construction. Everywhere they are fighting for life. War has now added its censorships. They, with other liberties, give ground in the struggle. They can be lost in time also by steady legal erosion wearing down broad principle into thin right."

Who does not feel more secure and confident of the future of American democracy, whatever minor differences of view may exist, because so clear and vigorous a maintenance of the essential freedom has prevailed in the interpretation of the Constitution? Where can harder blows be struck for liberty than by the courageous, perceiving judge, removed from the tumult of battle though he be? He wields effective weapons in the cause of democracy.

In the case of Mr. Justice Rutledge there will be other blows to be struck—hard, penetrating blows, forging new liberties and new opportunities for the common people of every race and creed. The direction in which his mind runs is indicated in a four-line concurring opinion on the Court of Appeals, as significant as anything he has done. The issue was over the enforcement of a covenant against negro ownership or occupancy of a residence in the nation's capital. The Court "conceded that

64. Jones v. Opelika, supra, note 60.

the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction," but went on to hold that in this case the neighborhood had so changed as to render enforcement inadvisable. Justice Rutledge concurred in the result for the reason assigned, even "if such a covenant as is involved in this case is valid in any circumstances, as to which I express no opinion."

The judge decides cases as they come to him, after hearing. He may not pre-commit himself, and he does not if he is worthy of his calling. But in the mind and heart of the great judge are ends to be served, drawn from the history and culture of the human race and from individual experience, prophetic of a future which is greater by far than the compromise with ignorance and meanness, the mixture of good and evil, which still prevails. To his hand there lies that store of vital truth which is the essence of the law—the principles of equity, the constitutional doctrines, and the sound rules of conduct which have in them the capacity for development to meet emerging needs. The growth to which they give rise may be trained in different directions. Wiley Rutledge has served notice of the direction in which he will train the law when opportunity offers. It is the direction of decency, of fuller life, of freedom and self-realization for every human being, unstunted by official oppression or the selfish devices of private individuals and groups.

IV

It has not been the function of this review to sketch the outlines of the body of law which Justice Rutledge has helpepd to create as a member of the United States Court of Appeals of the District of Columbia or to set forth his thought upon the problems involved. That has already been ably done.[65] The attempt has been, rather, to outline, so far as possible, the methods, the technique, the judicial craftsmanship, and something of the philosophy of the Supreme Court's newest member. It would be a work of supererogation to summarize too precisely what the record has revealed—the record, be it noted, of scarcely half the opinions and of relatively few of the cases in which he has participated. The sample has been sufficient, probably, to reveal the essentials of the art that has been evidenced—the

65. Treiman, Mr. Justice Rutledge (1943) 14 Mo. Bar J. 4..

careful analysis of facts, the appreciation of the interests at stake, the identification of the legal issues involved, the attention to the purposes underlying the law, and, finally, the decision in terms of the ends to be served.

The opinions of Justice Rutledge abound in legal learning. There are categories and rules drawn from the books, expounded through authorities copiously cited, and developed along logical lines. But always the critical faculty has remained at work, making copious use of the results of scholarship in treatises and law reviews and non-legal studies. Law is a means, not an end. Even its clear precedents must yield upon occasion to more desirable alternatives. Always its working must be watched and its growth directed according to the fruits it can be made to bear. Logic and life combine in judicial work of this calibre to produce a shaping of human activity which belies the taunt that law is restrictive or negative, revealing it instead as life-giving and positive in its contribution to human welfare.

The judge who would participate in this "grand manner" in the administration of law must bring a varied aptitude to his task—thorough technical scholarship, ability to comprehend all manner of affairs, a mind quick to detect fallacies, the ability to think constructively and even prophetically. Few can measure up to so high a standard. The keenness, the integrity, the fundamental philosophy of Mr. Justice Rutledge, as so far revealed, show with sufficient clearness that he does measure up. This is no weakling whom the American West has sent forth from its modern legal mansion.